COUNCIL OF EUROPE

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**Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights**

# Expert opinion

# Legal Review of the Draft Regulation on the Unified State Registry of Enforcement Documents

June 2020

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## LIST OF ABBREVIATIONS

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| CoE | Council of Europe |
| CM | Council of Ministers of the Council of Europe |
| Convention or ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| CEPEJ | European Commission for the Efficiency of Justice |
| CDCJ | European Committee on Legal Co-operation |
| Draft Strategy | Draft National Strategy for the implementation of general measures for the execution of the pilot judgments in the cases of *Yuriy Nikolayevich Ivanov v. Ukraine* and *Burmych and Others v. Ukraine* |
| Draft Regulation | Draft Regulation "On the Unified State Registry of Enforcement Documents" |
| State Registry | Database established under the Draft Regulation |

## EXECUTIVE SUMMARY

The State Judicial Administration of Ukraine requested an analysis of the Draft Regulation "On the Unified State Registry of Enforcement Documents" in the context of its compliance with Council of Europe standards and general measures to be adopted by Ukraine for the execution of the *Burmych* group of judgments of the European Court of Human Rights.[1] This Draft Regulation was prepared jointly by the State Judicial Administration of Ukraine and the Ministry of Justice of Ukraine.

The official request was submitted to the Council of Europe Project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights", which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The Project requested Mr Lilian Apostol, an international expert from the Council of Europe, who was previously involved in drafting the Draft Strategy, to prepare the requested report.

The report provides a legal review of the Draft Regulation "On the Unified State Registry of Enforcement Documents" as to its feasibility and compatibility with the relevant Council of Europe standards as well as within the context of the execution of the *Burmych* group of judgments. The report focuses in particular on how the Draft Regulation fits the context of the execution of the *Burmych* group of judgments; if the Draft Regulation introduces an automatic system for the execution of judgments and provides for an automatic audit of non-enforced judgments against the state. Further, the report looks into whether the new State Registry simplifies the Ukrainian enforcement procedure and if it introduces an effective system of data exchange between various institutions. Possible steps for further improvement of the Draft Regulation are also addressed in the report.

As regards the methodology, the report was prepared on the basis of the Council of Europe standards stemming from the Council of Europe Committee of Ministers' Recommendations, documents by other specialist Council of Europe bodies (e.g. the CEPEJ, CDCJ, the Venice Commission, etc., where applicable) in the field of enforcement and use of technologies in the judiciary, as well as the relevant European Court of Human Rights case-law.[2] In particular, these documents include: Recommendation Rec(2003)17 of the Committee of Ministers to Member States on Enforcement; Recommendation Rec(2003)15 of the Committee of Ministers to Member States on Archiving of Electronic Documents in the Legal Sector; Recommendation Rec(2003)14 of the Committee of Ministers to Member States on the Interoperability of Information Systems in the Justice Sector; CEPEJ "Guidelines for a Better Implementation of Recommendation Rec(2003)17 of the Committee of Ministers to Member on Enforcement" of 28 January 2010.

The scope of the Draft Regulation is to set up a database and assemble all information pertaining to writs for execution in one place. The establishment of such a State Registry will produce a number of serious legal effects, including the necessity to secure an efficient exchange of data

[1] Committee of Ministers, *Group ZHOVNER v. Ukraine* (2004); *Group YURIY NIKOLAYEVICH IVANOV v. Ukraine* (2009); *Group BURMYCH AND OTHERS v. Ukraine* (2017) See for details http://hudoc.exec.coe.int/eng?i=004-47973

[2] For instance, see *Metaxas v. Greece* (2004) para. 19'...In the Court's opinion, it is inappropriate to require an individual who has obtained the right to payment of a debt by the State, following legal proceedings, to bring subsequent enforcement proceedings to obtain satisfaction. It follows that the belated payment of the sums due to the applicant through enforcement proceedings cannot remedy the national authorities' failure over a protracted period to comply with the judgment.'

with other databases, in particular those introduced by the Law of Ukraine on Enforcement Proceedings of 2016. Therefore, the Draft Regulation should be regarded as a part of a larger effort: not only as a set of legal rules aimed at benefiting the judiciary of Ukraine but also as a necessary measure required for the execution of the *Burmych* group of judgments.

**Relevance of the Draft Regulation to the general measures**

The Draft Regulation seems to follow one of the core actions listed in the Draft Strategy and might be qualified as a significant legislative step forward.[3] Under the Draft Strategy, the recommendation is to "unite the data into one system of enforcement along with other databases relevant to the whole execution procedure.[4] The Draft Strategy also recommends ensuring an automatic execution of judgements, understanding it as a set of procedures that simplify the execution of judicial decisions involving the state as a debtor.[5] Apart from this, the Committee of Ministers of the Council of Europe underlined the need to develop an all-inclusive database of execution writs. In its last Decision of March 2020, it gave instructions to the domestic authorities in this respect.[6] Therefore, the present Draft Regulation, which sets up a unified coherent system of evidence of enforcement writs and contributes to the introduction of the "automatic execution" system, should be regarded as a small part of the substantive legislative improvements expected from the Ukrainian authorities. The Draft Regulation also remains a part of the measures aimed at designing an effective enforcement system in Ukraine.

**Relevance of the Draft Regulation to the individual measures**

In addition to being the general measure, the Draft Regulation might help with the execution of the individual measures commonly referred to as "historic debts" in the *Burmych* group of cases. The Draft Regulation serves to record all execution writs, but the status of the current writs recorded in other databases remains unclear (e.g. part of the so-called "4040 programme" or the cases pending before the European Court of Human Rights or under the supervision of the

[3] For the full text of the Draft Strategy for the Committee of Ministers see, '1348th meeting (June 2019) (DH) - Rule 8.2a Communication from the authorities (31/05/2019) in the case of YURIY NIKOLAYEVICH IVANOV v. Ukraine (Application No. 40450/04) [anglais uniquement] [DH-DD(2019)632]' (2019).

[4] '... The 2016 Law on Enforcement Proceedings has introduced the Electronic System for the Enforcement Proceedings, in which all the relevant documents shall be drafted, registered and stored by the enforcement officers. The system allows access to the state of enforcement proceedings, procedural decisions adopted, and other documents with the possibility of receiving copies. Furthermore, the Ukrainian authorities are now introducing a unified State Registry of Court Decisions and Enforcement Proceedings. … The unified electronic communication system shall allow for exchange and analysis of information and access, through a unique web portal, amongst relevant electronic registers (for example, the registers of notarial acts, of immovable property, of entrepreneurs, of commercial legal entities, of insolvency/bankruptcy proceedings, etc.)...' 'DH-DD(2019)632', p. 10 para. 4.

[5] '..... removal of the excessive barriers to enforcement proceedings for the cases with debts awarded against the state appear to be most appropriate. Creation of the infrastructure for joint use in e-enforcement and e-justice as envisaged by the draft law No. 8533 would be an important step forward in this direction. However, further improvements are needed to ensure the automatic transmission of the courts' decisions to the State Treasury, for actual payment, avoiding additional formalistic obstacles. In addition, the execution writs can either be incorporated into the judgments themselves or the courts should use the "judicial orders", which will lead to a direct enforcement towards debtors. .... [The judgment of the Constitutional Court of 15 May 2019] could serve the constitutional basis for further development of national legislation and judicial practice related to the automatic enforcement of judicial decisions.' 'DH-DD(2019)632', p. 7.

[6] 'CM/Del/Dec(2020)1369/H46-36', para. 7 'strongly encouraged the authorities, in particular the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data collection so that the overall picture as regards the enforcement of the judgments against the State may be readily ascertained;'

Committee of Ministers). The same could be said of the execution documents that are unrecorded but pending domestic execution, though they do not appear on any database whatsoever. Thus, it is recommended that the Draft Regulation is amended by creating a separate class of execution writs pertaining to decisions that await enforcement.

**Main conclusions**

The Draft Regulation should be perceived as the general measure necessary for the execution of the *Burmych* group of judgments, as it is one of the actions stated in the Draft Strategy and requested by the Committee of Ministers of the Council of Europe to be implemented by Ukraine in order to establish an effective enforcement system in Ukraine.

The Draft Regulation is a secondary source of law and, as such, is more flexible, detailed, and easily amended. At the same time the Draft Regulation can change its subordinate position if it adapts the mechanism and the way of processing of data to shift domestic practices and the authorities' perceptions about enforcement. For example, it could classify the execution writs and re-organise their registration in its own way so as to reflect the concept of voluntary and coercive executions.

The State Judicial Administration of Ukraine and the Ministry of Justice are both responsible for the implementation of the Draft Regulation, where the State Judicial Administration of Ukraine is the primary administrator, and the Ministry of Justice acts as a facilitator of connectivity with other databases. Thus, both the judiciary and executive authorities appear as the adopting entities of the Draft Regulation.

The new State Registry introduced by the Draft Regulation should be focused on establishing a continuous mechanism of recording and processing of data.

The Draft Regulation doesn't differentiate between legal regimes of voluntary execution and a genuine coercive enforcement of executional writs.

**Recommendations**

The structure of the Draft Regulation should be reviewed in order to reflect the registration of execution writs according to the stages of voluntary execution and coercive enforcement. It is also proposed that the Draft Regulation provisions are included to classify execution writs according to a typology of debts and enforcement obligations.

The Draft Regulation should be perceived as a measure to accomplish two goals at once, namely to resolve the current situation of the remaining non-enforced national judicial decisions and to contribute to the creation of an efficient enforcement system in the future.

The State Registry should be focused on establishing a continuous mechanism of recording and processing data.

The State Registry should place into a separate category the decisions that await enforcement, including those from the so-called "historical debt".

The clear interconnectivity of the State Registry with other databases should be ensured, and in particular with the database of enforcement proceedings.

It is recommended to include in the Draft Regulation provisions on which data should prevail in cases of errors, duplications or repetitive records. Also, a special procedure to repair obvious mistakes in the new State Registry should be introduced.

The Draft Regulation should contain a special rule on how to tackle duplications or repetitive records. There should be a mechanism that will connect the execution titles in case of joined execution procedures with the same creditors or disjoin the enforcement procedures in case of multiple creditors with partial execution be designed.

The Draft Regulation should be more explicit in regulating access and search tools, what reports the database could generate, and what data should be shared with other authorities.

It is recommended that the views of an IT expert or a specialist in the building and management of digital databases, network administration, and web design be sought.

If not already envisioned, the Draft Regulation may find it opportune to introduce a piloting period into its transitory provisions, when the preliminary legal effects will be applied.

Introduction of other aspects of the database might require specific expertise. Amongst these are questions of compatibility with personal data protection regulations and accessibility principles.

It is recommended that the rules of accessibility to the database (State Registry) for better public scrutiny and transparency be extended.

## BACKGROUND

The present chapter briefly outlines the general context of the Draft Regulation. As with any piece of legislation, the adoption of the Draft Regulation is being dictated by some general purpose. In this case, it is the necessity to resolve the major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions in Ukraine that leads the adoption of the Draft Regulation. Obviously, a systemic problem such as this requires a number of structural and multifaceted measures. The Draft Regulation, being a part of these measures, cannot be extracted from this general context.

On the other hand, the Draft Regulation is neither a principal measure nor a panacea for the problem of systemic non-enforcement. It is thus important to know where the Draft Regulation lies amongst all other measures aimed at resolving a systemic problem. Accordingly, the description of the context will be done with the focus on the question of where the requirement to build up a State Registry of enforcement titles stems from and, thus, to what extent the present Draft Regulation is feasible in the general context of resolving the systemic problem. For this, the report needs to return to the origins of the problem.

Both the European Court of Human Rights and the Committee of Ministers summarily identified 3 root causes leading to systemic non-enforcement in Ukraine, namely the lack of (i) an efficient enforcement system, (ii) existence of moratoria, and (iii) absence of effective domestic remedies. The Draft Regulation seems to fall into the range of measures destined to respond to the first challenge, that is to build an efficient enforcement system. The remaining root causes, moratoria and remedies remain relevant for the Draft Regulation but less important.

The Ukrainian authorities, in the post-*Burmych* process focused on two priorities. Firstly, they started to erase the backlog of so-called historic cases, mostly by paying monetary debts incurred following domestic unenforced decisions. The next course of action was to brainstorm a strategy of normative and structural reforms required to move the process of execution out of deadlock. Speaking in terms of the Committee of Ministers, these two types of actions could be assimilated into the individual and general measures, respectively. The relevance of the Draft Regulation should thus be assessed in these terms.

### Relevance of the Draft Regulation for individual measures

In terms of individual measures, the feasibility of the Draft Regulation is quite complex and controversial. Normally, the Draft Regulation is perceived as a part of the general measures, namely as one of the actions written in the Draft Ukrainian Strategy to build an effective enforcement system (see below). However, it seems that the Draft Regulation might somehow be connected with the Ukrainian authorities' actions aimed at resolving the so-called historic backlog of non-enforced cases. In this narrow sense, the context of execution of individual measures entails a detailed explanation.

From the perspective of individual measures, the current status of execution shows that 7 historic cases were closed[7] by the Committee of Ministers and a significant number of the so-called *Burmych*-type cases awaits the same resolution.[8] According to the information provided by the

[7] 'Resolution CM/ResDH(2020)46 Execution of the judgments of the European Court of Human Rights Seven cases against Ukraine (Adopted by the Committee of Ministers on 5 March 2020 at the 1369th meeting of the Ministers' Deputies)' (2020).

[8] 'DECISION 1369 meeting (DH) March 2020 - H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13)

Ukrainian Government almost 96% of the domestic decisions were enforced by paying monetary debts.[9] These cases were attributed to the so-called *Zhovner*-type cases and concerned only the State monetary obligations against so-called private debts. The remaining unenforced domestic decisions involve in-kind obligations, non-convertible in monetary equivalent. The closed cases are in fact more than just 7, given that some of these cases involve a number of applicants and, thus, a variety of enforced duties.

Yet, in terms of general statistics, this number still remains below expectations, at least in the Committee of Ministers' view. The latter pointed out the delays and some irregularities in payments to the so-called *Burmych*-type cases.[10] Despite being the first clue of the progress in execution, nothing could be inferred from the Committee of Ministers' documents and the Ukrainian Government's reports about the remaining cases registered as neither the *Zhovner* type nor the *Burmych* type. Indeed, the Committee of Ministers has no jurisdiction to supervise the execution of other non-European Court of Human Rights cases. Nor do the Ukrainian authorities have a specific obligation to report these cases, unless they choose to do so within the framework of reports on the implementation of the general measures.

A slight inconsistency in the classification of these cases is thereby observed. Both the Committee of Ministers and the Ukrainian authorities take a different view on the classification of domestic judicial decisions needing enforcement. It seems that, in spite of assembling all cases into one group, the Council of Ministers still classifies them either as so-called *Zhovner*-type or *Burmych*-type cases. The last type includes the so-called *Ivanov*-type cases following the European Court of Human Rights' classification as the "follow-up type".[11] The Committee of Ministers lists all these cases according to the criteria of being a "leading" or a "repetitive" case, as seen from the perspective of individual measures. If taken from the perspective of general measures, the Committee of Ministers sees no reason to make a distinction between all these cases; as all judgments regarding the *Zhovner, Ivanov,* and *Burmych* types involve identical general measures the Committee of Ministers treats them as one group.

The Ukrainian authorities, on the other hand, see all cases in bulk hardly distinguishing them from the perspective of the same Committee of Ministers' criteria. The most numerous and thus difficult cases, seen from the perspective of the Ukrainian authorities, are those that followed the *Burmych* pilot judgment of 2017.[12] They were unaccounted for by the authorities until after the delivery of the *Burmych* judgment. It seems that the authorities have no clue about the number of these unenforced decisions and had no clear vision about the scale of the problem in terms of the quantity of the domestic decisions requiring enforcement. The conduct of the Ukrainian authorities

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[CM/Del/Dec(2020)1369/H46-36]' (2020) para. 4"...noted the progress made in the payment of compensation to the applicants in the Burmych case; ...

[9] 'NOTES 1369th meeting (March 2020) - H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13)' (2020) n. 3'…out of 4,635 domestic decisions in this [Zhovner] group 4,464 were fully enforced.'

[10] 'CM/Del/Dec(2020)1369/H46-36', para. 4'...deeply regretted the significant delays in ensuring payment and called upon the authorities to speed up their payment process to all the applicants in this case in line with the previous indications given by the Committee'

[11] '...Bearing in mind that it had dealt with Ivanov-type cases for over 18 years, .... [the Court] decided to strike the Ivanov follow-up applications (12,148 applications [+ 5 more from the Burmych judgment] off of its list of cases. It found that the grievances raised in these applications had to be resolved in the context of the general measures to be introduced by the authorities at national level, as required by the execution of the Ivanov pilot judgment, including the provision of appropriate and sufficient redress for the Convention violations, such general measures being subject to the supervision of the Committee of Ministers. ...' 'CM/Notes/1369/H46-36'

[12] European Court of Human Rights, *Burmych and Others v. Ukraine [GC]* (2017).

in the so-called *Zhovner*-type cases was to enforce the domestic judicial decisions only after they had literally been returned by the European Court of Human Rights. The same tendency continued after the *Ivanov* and then the *Burmych* pilot judgments. This conduct impregnated the domestic authorities with the view that the European Court of Human Rights' judgments have priority over their own domestic judicial decisions and should be enforced first. Thus, they started to register all these cases at the expense of all other domestic decisions awaiting execution.

This dogma might have prejudiced the Draft Regulation to some extent. For example, the enforcement titles issued on the basis of the European Court of Human Rights' judgment and the respective domestic unenforced judicial decision in the same case might be recorded twice. In the alternative, there could be a risk of these judgments not being registered at all as the State Registry is not dedicated to so-called "historic debt cases". There could be a parallel database of such cases, most probably at the Ministry of Justice of Ukraine, at the office of the Governmental Agent. Moreover, not all of the European Court of Human Rights' judgments issued against Ukraine pertain to the non-execution problem, yet they appear as execution titles. Again, speaking in terms of the execution of individual measures in the whole post-*Burmych* process, how and whether the Draft Regulation covers these issues remains unclear.

**Relevance of the Draft Regulation to the general measures**

In terms of general measures, the Draft Regulation definitely falls into the right type of legislative measures and it could be a decisive action. It easily situates itself within the general framework of the reforms of the domestic enforcement system. In this sense, the progress of the *Burmych* execution shows that the Ukrainian authorities succeeded in identifying the root causes of the problem, introducing some legislative improvements and drafting a strategy. Still the Committee of Ministers sees the legislative changes as "non-tangible" and remains disappointed in the Ukrainian authorities' failure to grant the Draft Strategy some legally binding effects.[13]

Taken from this perspective, the present Draft Regulation seems to follow one of the core actions imbedded into that draft National Strategy for the implementation of general measures for execution of the pilot judgment in the case *"Yuriy Nikolayevich Ivanov v Ukraine*" and the judgment in the case "*Burmych and Others v Ukraine*" (Draft Strategy). [14] Thus, it might be qualified as a significant legislative step forward. In other words, from the Committee of Ministers' perspective, the Draft Regulation might cover two general measures, namely to implement in advance the unadopted Draft Strategy and, at the same time, be qualified as "tangible" legislative progress. Accordingly, in what follows, the Draft Regulation should be examined from these two aspects.

The Draft Strategy dedicates special attention to the measures of statistical evidence. It plans to institute a '*unified register of judicial decisions and of enforcement proceedings*" to monitor it and connect '*the data [from] previous registers [into] the new system*".[15] In its explanatory notes, the Draft Strategy underlines that an electronic system of enforcement proceedings has already been introduced and administrated by the State Bailiff Service. The purpose of another State Registry, as envisaged by the present Draft Regulation, is to record judicial decisions and unite the data into one system of enforcement along with other databases relevant to the whole execution procedure.[16]

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[13] 'CM/Del/Dec(2020)1369/H46-36', para. 5.

[14] See for the full text of the Draft Strategy Committee of Ministers, '1348th meeting (June 2019) (DH) - Rule 8.2a Communication from the authorities (31/05/2019) in the case of *YURIY NIKOLAYEVICH IVANOV v. Ukraine* (Application No. 40450/04) [anglais uniquement] [DH-DD(2019)632]' (2019).

[15] 'DH-DD(2019)632', p. 3 para. 4 of the Draft Strategy.

[16] '... The 2016 Law on Enforcement Proceedings has introduced the Electronic System of the Enforcement Proceedings, in which all the relevant documents shall be drafted, registered and stored by the enforcement

The introduction of the so-called "automatic execution" concept appears to be another element that is important in the current analysis. The Draft Strategy operates in depth with this concept, underlining its connection with lifting 'legislative barriers' and 'simplified procedures" to enforce social benefits granted by judicial decisions.[17] In the later explanatory notes, the Draft Strategy briefly develops the concept, understanding it as a set of procedures simplifying the execution of judicial decisions involving the state as a debtor.[18] These measures taken as a whole, are being qualified as "tangible legislative reform" in order to re-organise the domestic execution system.

Turning to these legislative reforms, the Draft Regulation appears to be just a narrow part of some substantive legislative improvements expected from the Ukrainian authorities. Still, it remains the part of the measures to design an effective enforcement system in Ukraine, but its added value differs if seen from the perspective of the European Court of Human Rights or from the perspective of the Committee of Ministers.

None of the European Court of Human Rights' pilot judgments have actually specified the need to record all writs for execution into one database or to introduce a system of so-called "automatic execution". Both the *Ivanov* and the *Burmych* judgments noted that the problem of non-execution is 'caused by a combination of factors, including the lack of budgetary funds, the bailiffs' omissions and shortcomings in the national legislation'.[19] The European Court of Human Rights' attention was, however, focused on the urgent need for remedies, rather than pondering the root causes of the problem and whether there is a database of non-enforced decisions.

Against this background, the Committee of Ministers underlined on a number of occasions the need to develop an all-inclusive database of execution writs. In its last Decision of March 2020, it almost gave instructions to the domestic authorities in this respect.[20] In addition, the Committee

officers. The System allows access to the state of enforcement proceedings, procedural decisions adopted and other documents with the possibility of receiving their copies. Furthermore, the Ukrainian authorities are now introducing a unified State Register of Court Decisions and Enforcement Proceedings. … The unified electronic communication system shall allow exchange and analysis of information and access, through a unique web portal, amongst relevant electronic registers (for example, the registers of notarial acts, of immovable property, of entrepreneurs, of commercial legal entities, of insolvency/bankruptcy proceedings, etc.)...' 'DH-DD(2019)632', p. 10 para. 4.

[17] 'DH-DD(2019)632', p. 2 para. 1 and p. 3 para. 1.

[18] '..... removal of the excessive barriers to enforcement proceedings for the cases with debts awarded against the state appear to be most appropriate. Creation of the infrastructure for joint use in e-enforcement and e-justice as envisaged by draft law No. 8533 would be an important step forward in this direction. However, further improvements are needed to ensure the automatic transmission of the courts' decisions to the State Treasury, for actual payment, avoiding additional formalistic obstacles. In addition, the execution writs can be either incorporated into the judgments themselves or the courts should use the "judicial orders", which will lead to a direct enforcement towards debtors. .... [The judgment of the Constitutional Court of 15 May 2019] could serve the constitutional basis for further development of national legislation and judicial practice related to the automatic enforcement of judicial decisions.' 'DH-DD(2019)632', p. 7.

[19] European Court of Human Rights, *Yuriy Nikolayevich Ivanov v. Ukraine* (2009) paras 83–84; *Burmych*, para. 13.

[20] 'CM/Del/Dec(2020)1369/H46-36', para. 7' strongly encouraged the authorities, in particular the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data collection so that the overall picture as regards the enforcement of the judgments against the State may be readily ascertained;'

of Ministers placed strong emphasis on the measures 'establishing a long-lasting solution based on a system of automatic enforcement of judgments',[21]

The Ukrainian authorities realise the value of such a unified database. It will serve both their efforts in the execution of the European Court of Human Rights' judgments and all other domestic decisions not covered by the *Burmych* pilot proceedings. This could be concluded from the root-cause analysis of the systemic problem that was carried out by the Ukrainian authorities. This is also proved by the follow-up Draft Strategy that mentions, amongst other things, that the domestic enforcement titles are being registered fragmentarily by a variety of authorities, without a clear and consistent methodology. The unified database is thus needed for statistical evidence and the introduction of the tools, conventionally known as "automatic execution".

In summary, the Draft Regulation thus represents one of the general measures to implement the Ukrainian authorities' execution efforts. In principal, it pursues the implementation of a unified coherent system of evidence of enforcement writs but it also contributes to the Ukrainian authorities' concept of the "automatic execution" system. It is in the context of these primary principles that the present Draft Regulation should be further examined.

**Relevant principles of the assessment**

Legislations are difficult to assess in the absence of generally accepted criteria. It is almost impossible to evaluate drafts of legislation since each country and legal system has its own rules of legislative ranking and hierarchy, procedures for adoption, legislative techniques, etc. In other words, there is no overall accepted algorithm for drafting legislation and thus assessing its compatibility.

So, two general methods could be employed in examination of any piece of legislation: *per article* review and an overall assessment of compatibility with some general standards chosen for comparison. *Per article* review offers a more detailed evaluation of normative compatibility but the whole picture could be lost. On the other hand, the overall assessment is less specific, but it better describes whether the piece of legislation fits its purpose and general scope. The chosen standards for the Draft Regulation to be compared with are those explained below.

The Draft Regulation has been subjected to comparison with the principles set out in the case-law of the European Court of Human Rights, in particular the requirements of effective enforcement systems and the *Metaxa* principle of the *ex-officio* execution of state debts. The later jurisprudential principle is the one that appears relevant for the purposes of the present assessment as it could somehow be assimilated into the Ukrainian authorities' views on so-called "automatic execution".

Normally, the ordinary meaning of automatic execution appears to be rather technical in character, namely reflecting a method for executing some debts without inputing them manually into automated systems. This term derives from trades, stocks, and other financial transactions. In this narrow sense automatic execution, as the Ukrainian authorities might see it, is far beyond the above-mentioned *Metaxa* principle of execution.

Automatic execution, according to the definition of the European Court of Human Rights, means *sua sponte* activity, when the process of enforcement starts without formal prompting from a creditor to seek execution of enforcement titles issued against the State or its affiliated entities. It reflects the principle that the creditor against the State should not be overburdened by superfluous

[21] Committee of Ministers, 'DECISION 1340 meeting (DH) March 2019 - H46-29 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Application No. 40450/04) [CM/Del/Dec(2019)1340/H46-29]' (2019) para. 4 in fine.

proceedings to ask for voluntary execution; the State itself should institute a system by which such writs of execution will be automatically enforced and be enforceable in practice.[22] This principle is not absolute and some procedural requirements might apply, provided that they do not impair the very essence of the right to have an enforceable title against the State executed by default.[23] In brief, automatic execution is mainly a process of voluntary execution without the necessary formalities and coercion from the execution creditor.

## OVERVIEW OF THE DRAFT REGULATION

The scope of the Draft Regulation is to set up a database and assemble all information pertaining to the of writs for execution. Its basic principle is to dedicate a virtual cell ("electronic cabinet") for every writ, where all information pertaining to the execution proceedings will be stored, managed, and shared with other information systems. Taken in the context of the Ukrainian authorities' efforts to implement the *Burmych* judgment, an all-inclusive registration system of all writs of execution is highly commendable.

The Draft Regulation creates a database administrated by the Ukrainian administrative authority of judicial affairs (the State Judicial Administration of Ukraine). In other words, the first input in the database ("the State Registry") will be that of the judges, who will record their final decisions for the follow-up execution. In addition, it extends the scope of the State Registry to other, non-judicial execution titles (for example, notary orders, exequaturs, international writs, etc.). The Draft Regulation connects the database with the bailiffs' digital tools for evidence of the enforcement proceedings (the Electronic System of the Law on Enforcement Proceedings of 2016). Taken as a whole, it appears that the present Draft Regulation intends to institute a system of evidence of all execution writs that were voluntarily executed and/or enforced coercively. In this later sense, one clarification is relevant.

The ordinary understanding of an execution system is that it should work autonomously, basing itself on the authority of the State institutions issuing execution writs. It normally works without unnecessary interference from the bailiffs or other coercive means of intrusion into the ordinary execution process. In other words, the enforcement proceedings are almost unnecessary,

[22] *Metaxas v. Greece* (2004) para. 19'...In the Court's opinion, it is inappropriate to require an individual who has obtained the right to payment of a debt by the State, following legal proceedings, to bring subsequent enforcement proceedings to obtain satisfaction. It follows that the belated payment of the sums due to the applicant through enforcement proceedings cannot remedy the national authorities' failure over a protracted period to comply with judgment.'

[23] *Akashev v. Russia* (2008)'... 21. The Court reiterates that a person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings .... Where a judgment is against the State, the defendant State authority must be duly notified thereof and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for compliance. This especially applies where, in view of the complexities and possible overlapping of the execution and enforcement procedures, an applicant may have reasonable doubts about which authority is responsible for the execution or enforcement of the judgment. 22. The Court already admitted in the past that a successful litigant may be required to undertake certain procedural steps in order to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means .... Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment .... In the Court's view, the requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the Convention to take timely and ex officio action, on the basis of the information available to them, with a view to honouring the judgment against the State...'

especially in the case of the writs for execution issued against the State authorities. It is the rule that the State executes judicial decisions or other execution titles issued against its entities without being asked or coerced to do so, namely, voluntarily. True enforcement starts when a debtor, irrespective whether it is a state authority or private one, resists such a voluntary execution. Then the execution process has to be transformed into enforcement at the request of the creditor who shall show necessary diligence in pursuing execution. He or she should perform at least *prima facie* actions to start enforcement proceedings, which are always exceptional in comparison with the ordinary execution proceedings.

In brief, the execution proceedings normally mean an ordinary implementation, namely to put a final judicial decision into effect, when the enforcement proceedings are compulsory, in order to make sure that a debtor actually follows the judicial orders. In the first situation, the execution is normally associated with automatic enforcement, while in the second case the concept is no longer applicable.

It seems that the Draft Regulation reflects the Ukrainian system of enforcement that is conceptually different from the above common understanding of the execution proceedings. It treats the enforcement as a rule assuming that a successful creditor needs to push enforcement proceedings, otherwise all consequences of non-execution are attributed to him. For example, the Draft Regulation distinguishes two main stages in the execution proceedings, which are the formal registration of an enforcement title (Chapter III) and the subsequent formal start of execution (Chapter IV). This distinction is hardly understandable from the overall accepted concept of an execution system seen in the majority of European states. From the perspective of the European model of an execution system, the registration of a judicial decision or other executory document is sufficient for the execution proceedings to commence. Once this process is unsuccessful or it is delayed, then the enforcement (coercive) procedures should be commenced, which should be reflected in the State Registry as a separate set of proceedings or just another stage of the overall progress relating to that executory title. In other words, the algorithm of execution could be illustrated as follows (see Figure 1. Simplified Chart of Executi):

- normally, the first condition is to check whether the execution title is final or a writ of execution has been issued;
- then, the execution title/writ is registered in the database, thereby the voluntary execution commences;
- if the voluntary execution is successful, then the procedure is closed;
- if not, then the enforcement proceedings should start and the execution title/writ should be transformed into an enforcement title ending with closure when the enforcement process is successful.

This is roughly the path of any execution writ, regardless of whether or not it followed the enforcement procedures. All other details and stages of procedure, such as change of execution, update or corrections to the execution titles are intermediary stages needing registration in one of these two alternative ways. This is how the database should be organised and how the Draft Regulation should structure its rules. However, the Draft Regulation distinguishes none of these basic alternative paths of a writ of execution and mixes them all into one pot. Given the particular situation of Ukraine fighting systemic non-enforcement, in particular in the cases against state debts, it would have been highly commendable to draw a line between different legal regimes of voluntary execution and a genuine coercive enforcement of the writs. Now, if such changes require the amendment of primary legislation, then nothing precludes the present Regulation from introducing such regimes on a technical level into the database. It will catapult the practices in the right direction; the legislation will then inevitably follow this trend.

This would be the principal remark on the Draft Regulation, which would require substantial rethinking and re-conceptualisation of its written texts. If the Ukrainian authorities would accept this argument on how to reconfigure the database then the Draft Regulation would need substantial redrafting. In the alternative, the Draft Regulation may introduce certain special denominators to classify the registered writs of execution.

For example, in Chapter I or II, a new paragraph could be added to create a legal classification of the writs into those addressed against the State authorities and private persons (horizontal and vertical execution), or writs subject to voluntary execution and enforcement, or any other classification relevant for the authorities (for instance, in-kind obligations, social-benefits cases, state entities debts, etc.). Currently, subsections 1 and 2 of Chapter II just copy the list of all available writs of execution to be included in the database. With the classifications set according to regimes of execution legally recognised, both the database and the execution process overall could be better managed and visible. It will help to render statistics and view the execution process from a systemic perspective, which will help the authorities to focus on the type of judgments that require urgent measures. On the other hand, it will show how the system works overall, whether the voluntary execution prevails and in which cases the enforcement system should not be overburdened by trivial and easily enforceable writs for execution. In any case, these amendments, either the Draft Regulation re-drafting or the introduction of the execution writs classes, has many benefits for the whole State Registry and the administrator of the system.

The writ classes reflect the reason behind the groups of specific enforcement documents and specific enforcement proceedings associated with these special execution titles. For instance, the Regulation might underline the difference between the so-called “vertical” and “horizontal” enforcement titles. The “vertical” type are those writs where the State itself, its body or institution or an affiliated agent, appears as a debtor of execution, whereas in the “horizontal” enforcement titles the opposing parties are both private.[24] As it transpires from the case-law of the European Court of Human Rights, in the first type of titles, the liability of the state authorities is higher than in the second type.[25]

Another example is the problematic regulation of certain types of executional obligations. The Draft Regulation hardly makes a distinction between one-off payments and continuous payments of debts (for ex. annuities, alimonies, monthly payments). The Chapter V, section 5 stipulates that the writs should be recorded as “in [continuous] process of enforcement” registering the continuous flow of payments of debts in case of so-called periodic payments. Normally, if such a writ of execution is continuously payed than it is continuously executed, thus it requires no enforcement. On the contrary, when such debts stopped being pay then the enforcement proceedings should start, and the writ could be tagged as unenforced. This demonstrates that the Draft Regulation grants the same legal regime to ordinary execution and enforcement proceedings. As mentioned above, this is due to the systemic confusion between these concepts

[24] For example, *Bobrova v. Russia* (2005) para. 16"... under the Convention the State is not responsible, as such, for the debts of a private body. Moreover, the principle that judgments must be executed cannot be interpreted as compelling the State to substitute itself for a private defendant in the case of the latter’s insolvency. The State’s obligation under Article 6 in this case was fulfilled by way of enabling the applicant to ask the bailiffs to enforce the execution of the court judgment in her favour. The fact that the bailiffs, for some time, were unsuccessful does not raise issues under the Convention in the circumstances of the present case.

[25] *Fuklev v. Ukraine* (2005) para. 84"...The Court, taking into account the considerations as to the liability of the State for the acts or omissions of private persons ..., finds that there was a lack of action on the part of the State Bailiffs’ Service, ..., to enforce the judgment given in the applicant’s favour within a reasonable time and to exercise effective supervision of the enforcement of the judgment by the IBF liquidation commission...

and the unordinary vision of the Ukrainian authorities with regard to execution proceedings as a whole. This vision should be revisited.

**Scope**

The general scope of the Draft Regulation is to build up an efficient enforcement system. The second scope is to record current enforcement titles and to register the upcoming flow of new enforcement titles. The principal scope is to create a unified database.

The State Registry records passive information and send notification of limited data pertaining to the execution processes. In this sense, it supplements the State Registry on Enforcement proceedings with which it exchanges data. This is to be done by interconnection on a technical level. This is positive practice.

However, as it stands now the principal purpose of the State Registry seems to serve judicial oversight over the enforcement proceedings. In other words, according to the texts of the Draft Regulation this is a registry designed for the judiciary, administered by the State Judicial Administration to benefit the judges who will issue and control execution titles. If it is so, then the scope is narrow. It will be preferable if the Draft Regulation starts with a preamble declaring the general and specific scopes of the State Registry to serve not only these institutional purposes.

**The source of law**

The Draft Regulation is a secondary source of law, meaning that it is flexible, more detailed, and easily amendable. In the current situation, it is acceptable to have this type of legislation to launch both the State Registry and the unified system. It will be better adapted to the ever-changing conditions in the future. In the long run, however, such a database might be subjected to regulation by primary legislation that offers greater certainty and legal authority. The current Draft Regulation neither accepts nor denies this perspective.

**Legal authority**

The Draft Regulation was prepared by the State Judicial Administration of Ukraine with the intention of being approved jointly with the Ministry of Justice of Ukraine. This means that these two entities will be responsible for the implementation of the database in practice, with the State Judicial Administration in the role of the primary administrator and the Ministry of Justice as a facilitator of connectivity with other databases. Thus, both the judiciary and executive authorities appear as the adopting entities of the Draft Regulation.

The Committee of Ministers' decision of March 2020, even if it specifies the judiciary, asks the Ukrainian authorities in general to 'establish a comprehensive system of judicial data collection'.[26] It seems reasonable to include an executive authority, such as the Ministry of Justice of Ukraine, into the system of data collection with virtually the same prerogatives for database administration. This choice does not run against the said Committee of Ministers' decision. On the contrary, it benefits both judiciary and executive branches of power by compelling them to cooperate and exchange data. It secures interconnectivity and a consistent flow of information between the databases of the Ukrainian executive and judiciary, which paybacks the execution process as a whole.

In addition, when speaking about the legal authority to adopt and implement the Draft Regulation, other considerations appear to be relevant. The Draft Regulation shall bind Ukrainian judges to registering primary data about judicial enforceable decisions. In so doing, they will frame the

[26] 'CM/Del/Dec(2020)1369/H46-36', para. 7.

whole process of execution and/or enforcement. Yet, the judges could be compelled and held responsible by no authority other than the High Council of Justice of Ukraine.

The present Draft Regulation, as with any other written source of law, relies on the implementation of its rules in good faith. However, no matter how positive the rules might be, they will not prevent the hypothesis of potential human error or even deliberate manipulation of the data by judges. In this sense, the judges' responsibility might be at stake and, accordingly, the supervisory role of the High Council of Justice comes into question. In this sense, the Draft Regulation is silent about the High Council of Justice's role in data processing and the effects of either wrongful acts or judicial human error (who reacts and how to secure the responsibility of judges for deliberately wrongful introduction of data into the Registry). While the latter question is only conjectural to the principal scope of the present Registry, still it needs to be rethought; whether there is the need to grant the High Council of Justice similar rights to administrate the database and should it be the entity in coordination with which the Draft Regulation should be adopted.

Moreover, should the execution system return to the exclusive authority of the judiciary (as there have been some proposals expressed in this regard) the State Registry might be reconfigured and rethought (for example, in terms of the database's administrator and the means of exchanging the data with executive institutions). In this scenario, the role of the High Council of Justice could be crucial.

In the end, the Committee of Ministers in its Decision of March 2020 expressly mentioned two authorities to adopt the regulation in question. It had its reasons to 'strongly [encourage] the authorities, in particular the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data collection'.[27] It seems that the Committee of Ministers, while mentioning two authorities, had in mind the particularities of the Ukrainian legal system, when the entities adopting a regulation matter for the binding force of the rules.

**Drafting legislative technique**

The present report deliberately left aside a detailed examination of the legislative drafting technique or legal drafting language, as they might be very specific in the context of Ukrainian law-making traditions. As mentioned above, in the general comments, the Draft Regulation might be fundamentally redrafted or amended to reflect the difference between voluntary execution and coercive enforcement proceedings, including some specific classes of execution writs. Those recommendations concern the legislative drafting technique that the Ukrainian authorities are free to choose.

**Quality of law**

The criteria of the quality of law are universally accepted. These are accessibility, clarity, and foreseeability of the legal texts. From the perspective of all these criteria, the Draft Regulation raises no visible concerns. It is assumed that it will be accessible.

None of the provisions were found to be manifestly unforeseeable, except the set of rules declaring the responsibility for the implantation of the Regulation and integrity of the recorded data (for example, the Chapter VIII, subsections 3 and 5). General references to some law or sentences such as "bears responsibility under the law" always raise flags about foreseeability. However, in secondary sources of law such as the present Draft Regulation it is accepted, though it is preferable for the text to be more explicit in establishing responsibility. Moreover, as mentioned above, some users of the database are judges and public officials, whose

[27] 'CM/Del/Dec(2020)1369/H46-36', para. 7.

responsibility for the integrity of the data they introduce must be clearly determined. In this sense, as with any legal norm, the Draft Regulation would acquire the necessary deterrence.

The last criterion, clarity, should be better assessed by a lawyer and native speaker of Ukrainian. The leading principle is that a legal text is clear if it is understandable in the view of any ordinary person who is not necessarily accustomed to specific juridical terminology. The Draft Regulation uses in abundance legal and technical terminology. Sometimes, the clarity could be affected by use of grammar rules, long sentences, commas, and specific styles. Obviously, these questions cannot be examined on the basis of the English translation of the text. Accordingly, the recommendation is to review the Draft Regulation from the perspective of clarity by a lawyer and native speaker.

## MAIN CONCLUSIONS AND RECOMMENDATIONS

The Draft Regulation constitutes a part of the context of the execution of the Burmych group of cases concerning the general measures aimed at building up an efficient enforcement system in Ukraine. This could be regarded as its principal purpose and the final outcome pursued by the Ukrainian authorities. Besides this, the draft regulation seeks to register all execution writs in one place and to secure an efficient exchange of data with other databases. Therefore, the draft regulation should be regarded in a much wider, rather systemic context. It is not just another set of rules to benefit the judiciary of Ukraine, it is more than a regular internal institutional judicial record of decisions and execution writs.

In addition to being a general measure of implementation, the Draft Regulation might help with the execution of the individual measures commonly referred to as “historic debts” in the Burmych group of cases.

The Draft Regulation doesn’t distinguish between the basic alternative paths of an execution writ (first, voluntary execution, and, if not successful, coercive enforcement) and mixes them together. It also hardly makes a distinction between one-off payments and continuous payments of debts.

The principal purpose of the State Registry seems to serve judicial oversight over the enforcement proceedings. However, it will be preferable if the Draft Regulation starts with a preamble declaring the general and specific scopes of the State Registry to serve not only these institutional purposes.

The Draft Regulation is a secondary source of law, meaning that it is flexible, more detailed, and easily amendable.

The State Judicial Administration of Ukraine and the Ministry of Justice of Ukraine are responsible for the implementation of the Draft Regulation in practice, with the State Judicial Administration of Ukraine in the role of the primary administrator and the Ministry of Justice of Ukraine as a facilitator of connectivity with other databases. Thus, both the judiciary and executive authorities appear as the adopting entities of the Draft Regulation.

From the perspective of the criteria of the quality of law (namely, accessibility, clarity, and foreseeability of the legal texts), the Draft Regulation raises no visible concerns.

The overall recommendations from this analysis can be summarized as follows:

1. It is recommended to review the Draft Regulation in order to rethink its structure. The authorities need to reflect on how to regulate the registration of writs according to the stages of voluntary execution and enforcement as such. The Draft Regulation might include provisions to classify the execution writs according to the typology of debts and enforcement obligations.

2. The Draft Regulation should be perceived as a measure to accomplish two goals at once, namely to resolve the current situation of the remaining non-enforced national judicial decisions and to contribute to the creation of an efficient enforcement system in the future. While being a measure of "killing two birds", the second goal should prevail.

3. The State Registry should be focused on establishing a continuous mechanism of recording and processing data. It needs to develop a stable system to register the continuous flow of judicial decisions and future upcoming execution titles.

4. The State Registry should place into a separate category the decisions that await enforcement, including those from the so-called "historical debt". This type of decisions requires separate treatment and classification as many of them are already in breach of the Convention or could easily amount to new cases before the European Court of Human Rights. Accordingly, their number and data associated with them are relevant in view of the feasibility of the remedies and assessment of compensations. These types of cases could be a separate class of execution writs.

5. The clear interconnectivity of the State Registry with other databases should be ensured, and in particular with the database of enforcement proceedings. It should also define what data prevail in case of an error or a duplication.

6. A special procedure to repair obvious mistakes in these databases needs to be introduced. Usually, any database of such a scale might contain controversial data, duplications, erroneous data, etc. For example, misspellings of names could generate two or more conflicting records. Databases generate serious legal implications, such as the status of enforcement documents, outcomes of the execution, the validity of certain information, starting and ending dates of enforcement proceedings, status of limitations, etc. These effects should be regulated. For example, in case of error in one database, it should be clear which data must prevail, or in cases of conflicting records, the data entered first or last should be granted validity, depending on their accuracy.

7. The Draft Regulation should contain a special rule on how to tackle duplications or repetitive records. It needs also to envisage a mechanism to connect the execution titles in case of joined execution procedures, with the same creditors or disjoining the enforcement procedures in case of multiple creditors with partial execution.

8. The Draft Regulation should be more explicit in regulating access and search tools, what reports the database could generate, and what data should be shared with other authorities. Certainly, these are rather technical aspects but, taken from a legal perspective, these tools might require a special regime and validity. Some data might be protected by law (for example, commercial interests or personal data) or be covered by institutional interests (for instance, judicial statistics, judges' reputation, etc.). It all refers to the accessibility of data and this needs legal coverage.

9. It is recommended that the views of an IT expert or a specialist in the building and management of digital databases, network administration, and web design be sought. The compatibility of the Draft Regulation from a technical point of view could be examined by an IT expert who is familiar with legal regulations. An opinion should be sought as to whether there are technical possibilities to build the State Registry as proposed.

10. If not already envisioned, the Draft Regulation may find it opportune to introduce a piloting period into its transitory provisions, when the preliminary legal effects will be applied. Pending this transition period, the users of the State Registry should be trained and the database itself should be tested. In this sense, it is recommended that a pilot implementation period be established, in which users will become acquainted with the database and legal implications will be studied. It is preferable to define in the Draft Regulation the timeframe and the geographical area for piloting the database. It should test the database, users' reactions, integrity and security of data, operability, etc.

11. Introduction of other aspects of the database might require specific expertise. Amongst these are questions of compatibility with personal data protection regulations and accessibility principles. While data protection requires separate analysis, questions on public access, transparency and publication of general statistics, and public scrutiny still need to be reviewed by the drafters of the Draft Regulation.

12. It is recommended to provide more clear rules on how and to what extent the data from the State Registry could be disclosed to other, obviously interested persons (researchers, NGOs and human-rights defenders, third parties, intervening persons, legal representatives in case of changing representation, etc.). The Draft Regulation distributes the rights to access and add administrative prerogatives according to the method of user accounting in the computer systems (for example, the administrator has the full prerogatives and the users have control over the data they inputted). This is an ordinary classification of prerogatives in IT systems but it might be risky from a legal point of view if applied blindly (for example, an administrator with full access can also make mistakes). Moreover, following this technical classification of access rights to the database, "guests" should be determined by the Draft Regulation in the same way as the users and administrators.

**Figure 1. Simplified Chart of Execution**